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No. 93-559

In The

Supreme Court of the United States

October Term, 1993

COLORADO STATE BOARD OF AGRICULTURE, in its capacity as the governing board of the Colorado State University,

Petitioner,

vs.

JENNIFER ROBERTS, JULIE OSBORNE, JANET BRUMBELOW, LAURA BIELAK, SARA STOUT, AMY RECOUPER, JENNIFER JACOBS, MALIA KUENZLI, STACIE STAFFORD, HEATHER NAKASONE, KIM JOHNSON, AIMEE RICE AINSWORTH, and LISA MIZE, in their individual capacities,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* ALABAMA ASSOCIATION OF SCHOOL BOARDS AND BIRMINGHAM PUBLIC SCHOOLS IN SUPPORT OF PETITIONER

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Respondents.

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MOTION OF THE ALABAMA ASSOCIATION OF SCHOOL BOARDS AND BIRMINGHAM PUBLIC SCHOOLS FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

The Alabama Association of School Boards ("AASB") and the Birmingham Public Schools ("District"),

a member of AASB, hereby move, pursuant to Rule 37.2 of the Rules of this Court, for leave to file the accompanying brief as *amici curiae* in support of petitioner. Petitioner's counsel have consented to the filing of this brief and consent of respondents' counsel has been requested but was denied.

The member school boards of AASB and the District are subject to Title IX of the Education Amendments of 1972 as amended, 20 U.S.C. § 1681. The AASB and District are comprised of schools which are representative of the thousands of kindergarten through twelfth grade schools throughout the United States and can demonstrate to the Court the effect that the legal standards announced by the court below may have on millions of students.

The movants seek to raise important matters not fully addressed by the parties concerning the potential threat to kindergarten through twelfth grade schools by an overreaching application of Title IX of the Education Amendments of 1972 as amended, 20 U.S.C. § 1681 ("Title IX"). Movants believe that the perspective of kindergarten through twelfth grade schools on the issues presented by petitioner will assist the Court in evaluating the national importance of the decision below.

For these reasons, the movants request leave to file this brief as *amici curiae* in support of the petition for a writ of certiorari.

Respectfully submitted,

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TABLE OF CONTENTS

Page

INTEREST OF AMICI CURIAE 1

ARGUMENT 2

I. THE IMPORTANCE OF INTERSCHOLASTIC ATHLETICS IN THE COMMUNITY AND THE DEVELOPMENT OF BOYS AND GIRLS 2

II. THE CONFLICTING OPINIONS OF THE LOWER COURTS LEAVE THE COUNTRY'S THOUSANDS OF K-12 SCHOOL DISTRICTS IN A CONFUSED STATE AS TO THE OBLIGATIONS OF TITLE IX 4

- THE SURVEY 8

- THE DISTRICT'S PROPOSAL TO OCR ... 10

III. THE PRACTICAL CONSEQUENCES OF THE APPLICATION OF THE SUBSTANTIAL PARITY TEST TO EDUCATIONAL INSTITUTIONS AT THE K-12 LEVEL 15

IV. USING A STATISTICAL DISPARITY TO SHOW A TITLE IX VIOLATION TAKES TOO NARROW OF AN APPROACH AT THE K-12 LEVEL OF EDUCATION 19

CONCLUSION 20

APPENDIX A ..... App. 1

APPENDIX B ..... App. 5

TABLE OF AUTHORITIES

Page

CASES

Cohen v. Brown University, 991 F.2d 888 (1st Cir. 1993) 6, 10, 12

Grove City v. Bell, 465 U.S. 555 (1983) 7

Franklin v. Gwinnett County Public Schools, 991 U.S. 899, 112 S.Ct. 1028 (1992) 5

Mayor of City of Philadelphia v. Educational Equality League, 415 U.S. 605 (1974) 15

Opinion of the Justices, 338, ___ Ala. ___, 1993 WL 134710 (Ala., April 27, 1993) 16

STATUTES

Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 ..... *passim*

OTHER AUTHORITIES

44 Fed. Reg. at 71,418 7

Pub. L. 100-259 § 1; 102 Stat. 28 (codified at 20 U.S.C. §§ 1687-1688) 7

Yaffe, *High School Athletics: A Colorado Story*, PHI DELTA KAPPAN, November, 1992 4

INTEREST OF AMICI CURIAE

The Alabama Association of School Boards ("AASB") is an association of local school boards in the State of Alabama which receive federal financial assistance. The Birmingham Public Schools (herein "BPS" or "District"), a member of AASB, is located in the City of Birmingham, Alabama and is subject to Title IX of the Education Amendments of 1972 as amended, 20 U.S.C. § 1681 (herein "Title IX") as the recipient of federal financial assistance and the sponsor of interscholastic athletic teams. The District has ten high schools (grades nine through twelve), twenty middle schools (grades six through eight) and fifty elementary schools (grades kindergarten through five). The District is representative of the thousands of school districts and schools throughout the United States which are subject to Title IX and are affected by its interpretation by federal courts and governmental departments.

Title IX decisions issued by lower courts are in conflict with one another and in conflict with the precedent of this Court and leave this District, and thousands like it, in a state of confusion over what is required to comply with Title IX. BPS has been undergoing a Title IX compliance investigation of its interscholastic athletic programs since 1986. Several AASB members are also undergoing compliance investigations. The Department of Education, Office of Civil Rights (herein "OCR") has seized upon the opinion of the court below and is interpreting it as requiring that the number of participants at each of the District's thirty middle and high schools (judged separately) must substantially reflect the enrollment of boys and girls

in each school. Furthermore, OCR has specifically identified which athletic teams the District must offer at each of its high schools.

The AASB and BPS have a strong commitment to compliance with Title IX in all of its programs, including athletics. Because of their institutional interests in the development of the law at issue here, the AASB and BPS seek leave to participate as *amici curiae* in support of the petitioner in this case. The District is in the unique position of having conducted an OCR-approved survey to determine the level of interests and abilities of each student in its high schools and thus, it will serve as the representative member of AASB in demonstrating the untenable ramifications of the lower court's interpretation of Title IX on school districts across the country.

ARGUMENT

I. THE IMPORTANCE OF INTERSCHOLASTIC ATHLETICS IN THE COMMUNITY AND THE DEVELOPMENT OF BOYS AND GIRLS.

Many forces serve to shape children on their journey to adulthood. Academic study and parental direction are both crucial in human development. However, interaction with one's peers plays a significant role as well. Athletics, and extracurricular activities in general, serve to provide children with the tools necessary to be successful and responsible adults.

Adolescents are going through a stage of human development where their identity and self-image shift

from the family-centered existence of childhood to the society-centered existence of adulthood. During this transition period, they need to identify with others to learn that they are normal and have a place in society with their peers. This is met by identifying with a group. Group identification can be achieved through sports, cheerleading, band, drama clubs, *et. cetera*, or through gangs and other unhealthy groupings.

Participation in an athletic program compels young people to learn time management, develop a "work ethic" and instills discipline. Athletic competition allows young people to experience and survive the pain of defeat and the joy of victory while still in the nurturing and learning environment of their schools and families.

This competition further serves to anchor young people to a societal framework, giving them a sense of belonging that is especially crucial in the teenage years. By rewarding good faith effort, it yields a sense of accomplishment and self-worth. Without the strong sense of self-esteem that athletic competition can provide, many young people fall prey to the harmful distractions that surround them every day. In addition, many young people find healthy role models during their experiences in athletic competition.

Athletic competition also provides an important interaction between a school and its surrounding community. In giving schools a more visible place within the community, athletic competition creates a greater incentive for the community to maintain its schools. A greater sense of cohesiveness can be generated between a school

and its surrounding community with the increased parental involvement that athletic competition can foster. Indeed, a greater sense of cohesiveness can be generated within the community itself through competition between schools and interaction between families and neighbors. Athletic competition also provides entertainment opportunities for families within the community. And of course, every community benefits when America's schools produce strong, well-rounded individuals to assume a place in society. *See generally*, Yaffe, *High School Athletics: A Colorado Story*, PHI DELTA KAPPAN, November, 1992, at 177-181.

II. THE CONFLICTING OPINIONS OF THE LOWER COURTS LEAVE THE COUNTRY'S THOUSANDS OF K-12 SCHOOL DISTRICTS IN A CONFUSED STATE AS TO THE OBLIGATIONS OF TITLE IX.

These *amici curiae* submit to the Court that the issues raised in the petition are not limited to intercollegiate athletics but will affect every school in the United States which receives federal funds.

The District is subject to Title IX, as is virtually every public school in the United States which receives federal financial assistance.[1] Failure to comply with Title IX can subject the schools to monetary damages, resulting from a private lawsuit filed by a student, parent or coach, or to the revocation of federal funds upon which schools have

[1] Schools receive federal funding for various vital programs including remedial education, handicap education, school lunch programs, school breakfast programs, R.O.T.C. and job training.

come to rely for survival. *See Franklin v. Gwinnett County Public Schools*, 991 U.S. 899, 112 S.Ct. 1028 (1992).

The District is a relatively poor inner city school system which struggles to provide the best possible educational experience for the over forty-two thousand students that it is required by law to educate. In 1992, for example, budgetary problems caused by a chronic lack of funding from the state government resulting in two years of back-to-back proration of the state's education budget, forced the District to terminate one hundred twelve teacher's aides in the school system including the elimination of entire categories of aides.

Since February of 1986, the District has been under a compliance investigation by the OCR. In 1992, the District conducted a survey of every ninth through eleventh grade student in nine of its ten high schools.[2] The survey instrument was approved by OCR prior to its administration. After analysis of the survey results, OCR issued an order to the District requiring that it add up to 50 additional girls athletic teams at the nine high schools found in violation of Title IX. OCR is also seeking to require administration of a survey at each of the twenty middle schools in order to determine which sports it will require to be offered at each of these middle schools. OCR seeks parity in actual participation rates at every school, in

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[2] OCR found in 1992 that nine of the District's ten high schools are not in compliance with Title IX. The District agreed to conduct a survey of the interests and abilities of its students in the nine high schools which were not found to be in compliance.

spite of statistical proof that OCR required to be developed which clearly shows that boys at a given school have a much greater interest in participation in interscholastic athletics than girls.

Application of the legal standard announced in the court below in almost every school in America could change the face of education in this country in a way the drafters of Title IX never intended. Adoption of any interpretation of Title IX which would require schools to achieve substantial parity based on sex in the rates of participation in interscholastic sports could result in the total elimination of athletic programs, or, in the very least, place an additional strain on the scarce education dollars available and create an expensive and bureaucratic nightmare for thousands of dedicated public educators, students, and taxpayers.

The OCR has indicated to the District that it is relying on the decision below as well as the First Circuit's recent decision in *Cohen v. Brown University*, 991 F.2d 888 (1st Cir. 1993) as support for its inflexible interpretation of Title IX. The District can demonstrate how the standards established by the decision below will lead to absurd results if applied to schools from grades kindergarten through twelve.

As pointed out in the well-reasoned petition for writ of certiorari submitted on behalf of Colorado State University, the opinion below allows the micro-management of sports offerings by courts and, as demonstrated by the OCR's treatment of the District, by the Department of Education. The rigid three-prong test for compliance will almost always require application of a rigid statistical test

to determine if the number of boys and girls actually participating in a sport substantially "mirrors" the ratio of boys and girls which attend the school.

Of course, the first prong of the test is one which requires on its face that compliance with Title IX is attained by statistical parity.[3] The second prong requires a "continuing practice of program expansion." The difficulty of proving this "continuing practice of program expansion" is demonstrated by the fact that the court below found that this prong was not satisfied by Colorado State University despite the undisputed evidence that the University had closed its statistical disparity from 15.6% in the late 1980's to 10.5% in the early 1990's. Pet. App. at C-13.[4]

The third prong is the key for any school which lacks statistical parity. The decision of the court below makes it

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[3] The court below adopted the OCR's three prong test. Pet. App. at C-9. The first prong states that compliance can be achieved by determining:

> Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments.

The OCR regulations upon which each prong of the test is based do not distinguish between interscholastic and intercollegiate competition. 44 Fed. Reg. at 71,418. OCR applies the same test to K through 12 sports teams as it does to intercollegiate competition.

[4] Title IX's provisions and regulations did not apply to athletic programs like those of the petitioner and these *amici curiae* until this court's decision in *Grove City v. Bell*, 465 U.S. 555 (1983) was legislatively overturned in 1988. *See* Pub. L. 100-259 § 1; 102 Stat. 28 (codified at 20 U.S.C. §§ 1687-1688).

clear that the third prong, which requires that the interests and abilities of the under-represented sex have been fully and effectively accommodated by the present program, is to be interpreted as requiring that 100 percent of girls' interests and abilities are accommodated in order to attain compliance. Since it is axiomatic that this will rarely occur at a school, the test as a whole really requires that a school must have "substantial proportionality" between athletic participation and enrollment in order to come within what the court below called a "safe harbor" under Title IX. Pet. App. at C-9.

As previously stated, OCR has utilized the inflexible standard adopted by the court below in determining Title IX compliance for every school receiving federal funds which has interscholastic competition. The absurd results of this inflexible approach are clearly demonstrated by the statistical evidence which OCR itself required to be generated in its seven-year-long investigation of the District.

Earlier this year, the financially strapped District, after analyzing interest and abilities statistics obtained from the student survey which the OCR approved, presented a proposal to the OCR which the District believes fully complies with Title IX. However, before explaining the survey results, the Court should understand how the survey instrument was used to measure students' interests and abilities.

THE SURVEY

The BPS' interest and abilities survey asked boys and girls to identify, from a list of thirteen sports, those in

which they would actually participate if they were offered at their school.[5] The survey asked students whether they had participated in interscholastic competition in a sport in the past and, if so, if they would participate in the future. If the student answered yes, the student was considered to be a reasonable prospect to participate in the future. If the student answered that he or she had not participated in interscholastic competition in the past but would like to (and would be willing to practice two hours per day during the week and would be available at night and on the weekends for competition), the student was considered to be a reasonable candidate for actual participation.[6] The number of students responding as indicated above were added together

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[5] The sports listed as choices on the survey were the thirteen sports sanctioned and regulated by the Alabama High School Athletic Association ("AHSAA") (i.e., football, basketball, baseball, softball, soccer, track, volleyball, cross country, swimming, gymnastics, wrestling, golf and tennis). All states have a similar organization which promulgates rules governing eligibility, starting and ending dates of practice and competitive seasons, and competitive rules, etc. The intercollegiate counterpart to the AHSAA and similar organizations is the National Collegiate Athletic Association ("NCAA").

[6] The District's Athletic Director conducted an informal telephone survey of Birmingham, Alabama area athletic directors and coaches which yielded a consensus opinion that a student must be willing to practice two hours a day (five days per week) and be available at night and on weekends for competition in order to be considered a reasonable prospect for actual participation because this would be the minimum commitment needed from the student athlete. OCR has implicitly recognized the reasonableness of these criteria.

to determine the total number of boys and girls expressing "sufficient" interest in a given sport to be considered a reasonable prospect for actual participation.[7]

The District's analysis of the survey did not attempt to eliminate students who may have sufficient interest but who lack the "ability" to compete at the high school level because interviews of the District's students and employees revealed that students are almost never "cut" from a team for lack of athletic ability.

Most of the high schools surveyed have about the same number of girls and boys. Without exception, the survey results showed that boys have a proportionately greater interest in participating in interscholastic sports than do girls.

THE DISTRICT'S PROPOSAL TO OCR

The District proposed to OCR that it would utilize the survey results in such a way as to provide substantially equal accommodation of the interest expressed in the survey. In the nine high schools, this would result in

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[7] At the intercollegiate level, as in *Brown University*, 991 F.2d 888, 900 (1st Cir. 1993), women often argue that the institution should not be allowed to defend a claim based on the fact that women have proportionately less interest than men because the institution has the ability to shape the relative levels of interest in its student population by the levels of scholarships offered and other recruiting techniques. Whatever merit exists in this argument relative to intercollegiate athletics, it has no application in K-12 programs as the schools do not recruit students but merely accept whomever happens to live in that district.

adding a total of six new girls sports teams and an unspecified number of junior varsity teams for existing sports at a school. For example, if thirty boys sign up to play basketball and a boy's junior varsity team is started, and a similar number of girls sign up to play basketball, a junior varsity team will be added for girls.

An example of this approach is Parker High School (herein "Parker") which has a total enrollment of 999 students, with a substantially equal division between boys and girls. A chart reflecting Parker's survey results is at Appendix A. At Parker, 207 girls and 398 boys expressed interest in the thirteen sports (i.e. girls expressed 34% of the total while boys expressed 66%).

The District proposed to OCR that it would comply with Title IX by continuing to offer football, basketball (varsity and junior varsity), baseball, and track for boys, and basketball, softball and track for girls. In addition, the District proposed *adding* a girls volleyball team (including a junior varsity team if enough girls came out for the sport) and adding a junior varsity girls basketball team. In all, the District offered to add three new teams or sports for girls at Parker. These sports offerings would result in accommodating 214 boys and 122 girls for a total of 336 students (assuming that they all actually participated). Of the total number of interested students accommodated (i.e., 336), 64% would be boys and 36% would be girls. This would result in leaving 46% of the boys who are potential participants unaccommodated and only 40% of the girls who are potential participants unaccommodated (e.g., of the 398 potential male participants in sports, only 214, or 54%, would be accommodated).

The proposal outlined above would undoubtedly result in accommodating the same proportion of boys and girls interested in participation. It would, however, probably result in a greater number of boys actually participating in sports than girls due solely to the fact that boys at Parker have twice the relative interest of girls.

The method proposed by the District to OCR was implicitly rejected by the court below and explicitly rejected by the First Circuit in *Brown University*, 991 F.2d at 899, – and rejected by OCR based on those cases. *See* OCR Letter to the District at Appendix B, hereto.

Like the court below and the *Brown University* court, OCR applies a standard requiring parity in actual participation rates or the accommodation of all interested females in order to comply with Title IX.

The practical effect of the holding below is that every school in this country can achieve compliance only by either:

1. Showing an actual numerical parity in the participation of boys and girls; or
2. Showing that the interest of every girl has been accommodated by offering them a spot on an athletic team of their choosing.

For example, as Parker has been told by the OCR since it has not achieved numerical parity (and will not under the District's proposal) it must offer eleven new girls' teams or sports, including the possibility of offering swimming and gymnastics, despite the fact that the school has no swimming pools and has no suitable gymnastics equipment for an interscholastic level team. *See*, Appendix B.

Under the test of the court below, if boys at Parker are allowed to continue to play basketball, junior varsity basketball, track, baseball and football, 184 boys who want to compete in interscholastic athletics would be left unaccommodated by those offerings. On the other hand, all girls who want to participate in interscholastic athletics will have the opportunity to do so, with the exception of two girls who want a soccer team.[8] The drafters of Title IX could not have intended such an absurd and unfair result. Accommodating 99.5% of the girls and only 54% of the boys at Parker High School in Birmingham, Alabama is what the decision below would require and it is what the federal government is ordering the District to do.

If this result is not sufficiently horrifying, look at a few examples of what the OCR says the substantial parity rule would require at middle schools. In the 1989-90 academic year, the middle schools were allowed to field teams that would play from one game to a few times a year in boys *and* girls basketball, cross-country, volleyball, track and gymnastics.[9] Middle school programs are very informal and rely solely on volunteers to coach and upon whether the school has the funds and facilities to participate.

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[8] The District has allowed girls to play on boys teams for years and has actually had several to do so. Hence, if the one girl who indicated in the survey that she wanted to play football and the four girls who did the same for baseball actually signed up to play, they would be accommodated. The one girl interested in wrestling would not be accommodated because the District has no boys wrestling teams. *See* Appendix A.

[9] Gymnastics events at this level would only involve simple tumbling activities.

Pursuant to the District investigation, OCR found that Daniel Payne Middle School was in violation of Title IX. At that school, individuals volunteered to "coach" only boys and girls basketball, gymnastics and cross country. Students were then asked to sign up if they wanted to play. Because no students wanted to run cross-country, it was not offered. Twelve boys played basketball and one girl participated in gymnastics. An insufficient number of girls signed up for basketball to field a team. Pointing out that Daniel Payne's enrollment of 419 children was about 50% boys (208) and 50% girls (211), and that 92% (or 12) of the "athletes" were boys and only 8% (or 1) were girls, the OCR found by a letter dated January 14, 1993 that "the interests and abilities of boys and girls were not being equally effectively accommodated . . . . " Under the substantial parity test, since only one girl could participate in what was offered, only about one boy could participate. Since basketball teams require that at least five boys play, Daniel Payne could comply only by either not allowing any boys to play or by not allowing any students to play.

W. J. Christian Middle School was also found in violation of the substantial parity test. It has 238 students – 94 boys (39%) and 144 girls (61%). Of 29 participating "athletes", 57% were boys (i.e., 15) and 43% (i.e., 14) were girls. Under the parity test, because girls comprise 61% of the student population, they should have represented close to 61% of the total student athletes. Assuming 15 boys participated, room should have been made for nine additional girls to achieve parity. Or, assuming that only enough coaches volunteered to coach girls sports to accommodate 14 girls, only nine boys should have been

allowed to play. Under the parity test, the principal of W. J. Christian violated Title IX – despite offering basketball and gymnastics for boys and volleyball and gymnastics for girls. This determination was based upon OCR's finding that "the principal decided not to offer track because it coincided with the gymnastics season." Since the court below and OCR allow proof of discrimination by statistics *alone*, the District cannot present the above-referenced decision of the principal at W. J. Christian Middle School as a sex-neutral reason for the numerical disparity. As a result, the District could either lose its federal funding or face the threat of monetary damages and injunctive relief in a suit brought by a private plaintiff.

The test applied by the court below, as illustrated by the above examples, would not comply with this Court's decision in *Mayor of City of Philadelphia v. Educational Equality League*, 415 U.S. 605, 620-21 (1974). Allowing proof of discrimination by the use of the statistical proof alone finds no anchor in the precedent of this Court. The statistical parity test would lead to results in the above examples which clearly show that use of statistics alone is often "meaningless". *Id.* School districts across the country urgently need guidance in the meaning of Title IX which can only come from this Court.

III. THE PRACTICAL CONSEQUENCES OF THE APPLICATION OF THE SUBSTANTIAL PARITY TEST TO EDUCATIONAL INSTITUTIONS AT THE K-12 LEVEL.

If the Tenth Circuit's interpretation of Title IX is allowed to stand and becomes the standard for all schools

which fall under its application, the practical consequences in complying with it will be that students who are unfortunate enough to live in a poorer area, such as a rural or inner city school district, will be disproportionately affected. This result will affect both girls and boys alike. While budgeting at the higher education level might not be the most important factor to be considered in extracurricular activity decisions, it is a stark reality at the K-12 level. The test propounded by the Tenth Circuit would take away a school administrator's power to provide opportunities that are fair to both sexes given limited economic resources, and this inability of school administrators to make equitable decisions concerning school athletics will have its greatest impact in poorer school districts. Schools in poorer districts which lack sufficient funds to add the new sports required by the Tenth Circuit's interpretation will have to make tough decisions about the opportunities, if any, they will provide in the future.

Alabama courts have recently held that the state has a constitutional duty to educate all the young people of the state "regardless of the wealth of the communities in which the school children reside" and has ordered reform. *Opinion of the Justices, 338,* ___ Ala. ___, 1993 WL 134710 (Ala., April 27, 1993). The District has a history of proration and, as previously noted, has recently been forced to terminate one hundred twelve teacher's aides. For systems like the District, one of three choices will have to be made in order to comply with the Tenth Circuit's interpretation of Title IX: (1) stop providing any athletic opportunities for students; (2) eliminate some of

the interscholastic athletic opportunities currently provided for boys; or (3) reduce the financial resources dedicated to academic programs which are already underfunded and/or raise taxes on state and local citizens.

In poor districts that are forced to eliminate interscholastic athletic opportunities, the likely result will be that both boys *and* girls will have less opportunities available to them. However, the effect on girls will probably be much greater. Many of the same private community organizations which currently offer athletic opportunities to young people will be expected to fill in the void (especially in more affluent areas). However, it is likely that these groups would concentrate on providing opportunities in the revenue self-sustaining sports of boys football and basketball. Hence, while boys would see their opportunities diminish, it is probable that girls would receive even less.

Where private sources fill in the gaps created by local schools, young people will be competing in a non-regulated environment. Where schools provide the athletic programs, practice times are regulated to keep athletics from interfering with academics and students are required to undergo physical examinations prior to participation to ensure that they are able to compete safely. Transportation to and from competitions is also regulated and supervised by the schools. Where private sources provide these opportunities, the only regulation and supervision will be on a self-imposed and an *ad hoc* basis.

Where a school is forced to cut back on boys athletic programs to comply with Title IX, the first ones to go will be the non-revenue producing sports, such as golf, tennis,

cross-country, soccer, and track. Unfortunately, because these sports can sometimes be coached by the same person for boys and girls, boys will be told that they cannot participate but that girls can. If schools are forced to comply with the new three-prong test of the Tenth Circuit, situations will exist where opportunities are offered to girls but not to boys solely for Title IX compliance reasons despite having the available interest, coaches, and facilities. For example, at Parker High School, girls will be allowed to participate in tennis, golf, cross-country and, possibly, swimming, while the boys who could participate will not be allowed to do so.

In short, equally accommodating the interests in athletics of both boys and girls is a very complicated task, especially at the K-12 level where economics and funding, not to mention political and parental pressure, play such a large role in the decision-making process. This problem cannot be solved by looking at statistics alone without creating a whole new set of inequities. Guidelines are needed which would allow school officials to make equitable decisions based on the limited economic resources available.

In instances where schools are forced to make the unfortunate decision to eliminate all interscholastic athletics because they lack sufficient economic means to comply with the "effective accommodation" test, boys and girls who participate in auxiliaries, such as pep clubs, marching bands and cheerleader squads, which revolve around certain sports, will have their interests go unaccommodated as well. These auxiliaries provide many of the same benefits in the development of young boys and girls that the actual participants in athletic competition

receive. Where the sports which support these auxiliaries are eliminated, these auxiliaries will no longer be needed, and the interests of the former participants will go unaccommodated. It would be very condescending indeed to not appreciate these important interests when considering the application of a new Title IX standard.

IV. USING A STATISTICAL DISPARITY TO SHOW A TITLE IX VIOLATION TAKES TOO NARROW OF AN APPROACH AT THE K-12 LEVEL OF EDUCATION.

According to the Tenth Circuit, a statistical disparity between boys and girls is conclusive and irrebuttable proof of a Title IX violation unless the educational institution can show continual expansion of programs for the under-represented gender, or unless it fully and effectively accommodates the interests and abilities of that gender. Pet. App., C-9. If statistical disparities alone are to be used to show violations of Title IX, the entire spectrum of extracurricular activities offered by an educational institution should be examined, instead of merely one portion of those activities, i.e., athletics. When a magnifying glass is placed over one portion of a school's extracurricular offerings and a violation is declared based solely on a statistical disparity, the efforts of school officials to accommodate the interests of all students, both academic and athletic, are ignored. It also wrongfully assumes that boys and girls, at any particular age, are interested to the same extent in athletics and that any particular school has sufficient funds available to offer enough athletic programs to fully accommodate the interests of both genders in athletic competition. The

equitable allocation of resources to boys and girls athletics is not something which should be examined in a vacuum. If statistical disparity is to be the standard, then the examination should focus on the entire spectrum of extracurricular opportunities available and not just on one portion of those opportunities.

CONCLUSION

The issues which petitioner has asked this Court to review are not limited to intercollegiate athletics. Indeed, confusion surrounding the Title IX issues raised by the petitioner will have greater impact on the kindergarten through twelfth grade schools across the country. The *amici curiae* strongly urge this Court to grant the petition for *writ of certiorari*.

Respectfully submitted,

GAILE PUGH GRATTON
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November 3, 1993

APPENDIX A

PARKER HIGH SCHOOL

	A NO. PAST/ CURRENT AND TO CONTINUE	B NO. WHO HAVE NOT PARTICIPATED BUT WILL[1]	C TOTL. WITH SUFFICIENT INTEREST	D CURRENTLY OFFERED	E PROCEED TOWARD OFFERING
GIRLS:					
FOOTBALL	0	1	1	NO	NO
BASKETBALL	30	6	36	YES	YES
BASEBALL	5	2	7	YES	NO
SOFTBALL	11	11	22	NO	YES
SOCCER	1	1	2	NO	NO
TRACK	21	3	24	YES	YES
VOLLEYBALL	27	13	40	NO	YES
CROSS-COUNT	9	1	10	NO	NO
SWIMMING	16	8	24	NO	NO
GYMNASTICS	7	11	18	NO	NO
WRESTLING	0	1	1	NO	NO
GOLF	1	3	4	NO	NO
TENNIS	11	7	18	NO	NO
TOT. GIRLS:	N/A	N/A	207[3] (34%)		

BOYS:					
FOOTBALL	57	18	75	YES	YES
BASKETBALL	37	18	55	YES	YES
BASEBALL	8	12	20	YES	YES
SOFTBALL	1	3	4	NO	NO
SOCCER	1	6	7	NO	NO
TRACK	54	10	64	YES	YES
VOLLEYBALL	15	11	26	NO	NO
CROSS-COUNT	19	10	29	NO	NO
SWIMMING	23	13	36	NO	NO
GYMNASTICS	10	8	18	NO	NO
WRESTLING	10	13	23	NO	NO
Ggolf	6	14	20	NO	NO
TENNIS	7	14	21	NO	NO
TOT. BOYS:	N/A	N/A	398[2] (66%)		

PROPOSED OFFERINGS:	# ACCOM-MODATED	% OF TOTAL INTERST ACCOM-MODATED[4]	% TOTAL INTER-EST[2,3]	# ENROLLED	PERCENT ACCOMMO-DATED[5]
BOYS					
FOOTBALL	75				
BASKETBALL	55				
BASEBALL	20				
TRACK	64				
TOTAL	214	64%	66%	50%	54%
GIRLS					
BASKETBALL	36				
SOFTBALL	22				
TRACK	24				
VOLLEYBALL	40				
TOTAL:	122	36%	34%	50%	60%

App. 3

[1] Based on those students who said they would be available to participate five days a week for two hours or more and that they would be available on weekends.

[2] Total interest among boys.

[3] Total interest among girls.

[4] Percentages represent the proportion of boys and girls whose interests would be met by the proposed offering. I.e., a total of the interest of boys and girls (398 + 207) is 605 - 64% boys and 36% girls.

[5] Percentages represent the total number of one sex who would be accommodated by the proposed offerings by the total number of one sex expressing sufficient interest in all sports. For example, boys express a total interest of 398 and the proposed offerings will accommodate 214 males (i.e., 1 - (214/398) = 54%).

APPENDIX B

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS
REGION IV
POST OFFICE BOX 2048
ATLANTA, GEORGIA 30301

October 22, 1993

Mr. Thomas F. Campbell
Attorney
Lange, Simpson, Robinson, and Somerville
1700 First Alabama Bank Building
417 Twentieth Street, North
Birmingham, Alabama 34203

Dear Mr. Campbell:

Re: Complaint #04-85-1229

The office for Civil Rights (OCR) received your letters dated June 22, 1993, July 19, 1993, and August 10, 1993. These letters provided information concerning actions taken by Birmingham City School District (District) to correct violations of Title IX of the Education Amendments of 1972 (Title IX), as amended, 20 U.S.C. Sections 1681 *et seq.*, and its implementing regulation at 34 C.F.R. Part 106.

On January 14, 1993, OCR issued a Letter of Findings (LOF) in which the District was found to be in violation of Title IX at 34 C.F.R. Section 106.41(c)(1) because it failed to fully accommodate the interests and abilities of its female students. Additionally, the District was found in violation of the regulation at 34 C.F.R. Section 106.41(c)(3) and (c)(7) because of inequities in scheduling

of practice times and the provision of locker rooms, practice, and competitive facilities.

As part of the corrective action plan, the District agreed to remedy the violations and submit a copy of the Athletic Interest Survey within 30 days of the Letter of Findings (LOF). The District provided OCR a copy of the Survey on October 6, 1992, prior to the issuance of the LOF. On October 22, 1992, OCR notified the District that the Survey format was acceptable. The District also agreed to conduct a survey of interests and abilities at seven middle schools and all high schools, except Phillips, within 60 days of the date of the LOF. Where interest is expressed, if enough students to field a team followup the expressions of interest by trying out for the team and the sport is a spring sport, it will be offered in the Spring of 1994. On January 4, 1993, OCR received a copy of the raw data results of the interest and ability survey and was informed that a copy of the analysis of the data would be received by January 20, 1993.

On April 30, 1993, OCR requested that the District submit copies of the schedules for the Fall 1992 sports at the high schools and middle schools. We have since discovered that a typographical error was made in the LOF issued on January 14, 1993. Item 3 of the conclusion on page 31 should have a due date of May 31, 1994 for the 1993-94 winter and spring sports.

Fall sports for the 1993-94 school year are still to be reported by December 31, 1993. We apologize for any inconvenience our error may have caused you.

On June 22, 1993, OCR received the District's analysis of the interest and ability survey. A review of the information indicates that 6 girls' sports have been added to the 9 high schools surveyed since the 1989-90 school year. In addition, 10 girls' sports and 4 boys' sports have been dropped at the 9 high schools since the 1989-90 school year. A review of the survey indicates that there is sufficient interest by enough girls at the following high schools to field a team in the following sports.

High School	Sport(s) to be offered to girls
Carver	Volleyball Ensley Tennis, JV and possibly Freshman Basketball
Huffman	Soccer, Track, Tennis, JV and possibly Freshman Basketball
Jackson-Olin	Softball, Track, Volleyball, JV Basketball
Parker	Softball, Track, Cross Country, JV Basketball
Ramsey	Softball, Track, Tennis, JV Basketball
Wenonah	Softball, Volleyball, JV Basketball
West End	Tennis, Cross Country, JV and possibly Freshman Basketball
Woodlawn	Cross Country, Tennis, JV and possibly Freshman Basketball

The above sports that are spring sports are to be offered in the spring of 1994. All fall and winter sports are to be offered in the 1994-95 school year. In order for OCR to monitor the District's fulfillment of this issue of the corrective action plan, the District will provide OCR with the girls' spring sports that are added at the above high schools by May 31, 1994. The fall and winter girls' sports

that are added are to be reported by December 31, 1994. Squad lists are also to be submitted for each sport that is added. The survey also indicates interest by girls in swimming and gymnastics. This will be the subject of a further review by the District.

We remind you that we have not received your analysis of the survey conducted at the middle schools. This should be submitted within 15 days of the date of this letter. Upon receipt of this information, an evaluation will be made regarding the District's compliance on this issue.

As part of the corrective action plan, the District agreed to provide a copy of Phillips High School's practice schedule for boys' and girls' basketball teams' rotation of the use of the gyms and locker rooms. In your letter dated August 20, 1993, you provided OCR with a copy of a memorandum from the principal of Phillips High School stating that the girls' basketball team practiced by their choice in the facility in the main building. The District must rotate use of the gyms and locker rooms at the high school between the boys' and girls' basketball teams to meet the requirements of the corrective action plan. A statement from the District stating that this rotation has been put into effect, should be submitted within 15 days of this letter. Upon receipt of this information, an evaluation will be made regarding the District's compliance on this issue.

As part of the corrective action plan, the District agreed to provide OCR with copies of the boys' and girls' basketball practice schedules for all high schools except Carver, Ensley and Wenonah. The District provided these schedules to OCR in a letter dated September 29, 1992. On

April 30, 1993, OCR notified the District that based on a review of the practice schedules, the boys' and girls' basketball teams at Ramsey High School meet the requirements of the corrective action plan on this issue. Additional information was requested on the remaining high schools so that OCR could make an evaluation. Carver High School was included in this request because a review of their schedule indicated that practice times were not being rotated between the boys' and girls' basketball teams.

In letters dated June 22, 1993 and August 10, 1993, the District provided OCR with the requested information. A review of these basketball practice schedules indicates that the boys' and girls' basketball teams at Woodlawn, West End, and Parker High Schools are practicing the equivalent amount of time and their regular season and out of season practice is also equivalent and, therefore, these schools now meet the requirements of the corrective action plan on this issue. Jackson-Olin High School's boys' basketball team practices 35 minutes per day more than the girls' basketball team. In addition, the boys' team has a spring practice. There is no spring practice for the girls' team. Phillips High School's boys' basketball team practices in the early time slot for three weeks, in contrast to the girls' practicing one week in the early time slot. Carver High School's boys' basketball team always practices in the early time slot and does not rotate with the girls' team.

The following action must be taken at these schools before an evaluation can be made regarding compliance with the corrective action plan on this issue. Jackson-Olin High School must increase the girls' basketball teams

practice time to equal the boys' basketball team's practice time and provide the girls' team with a spring practice. Phillips and Carver High Schools must rotate the early practice time equally between the boys' and girls' basketball teams. OCR is unable to evaluate Huffman High School's practice schedule because some of the practice days do not indicate specific beginning and ending times of practice. The District should submit the specific times of practice for boys' and girls' basketball practice at Huffman High School and a statement that the requested actions have been taken at Jackson-Olin, Phillips, and Carver High Schools within 15 days of the date of this letter. Upon receipt of this information and evaluation will be made regarding the District's compliance on this issue.

We remind you that failure to take all the corrective actions agreed upon will subject the District to a referral for enforcement due to noncompliance with Title IX.

This letter is not intended nor should it be construed to cover any other issues regarding compliance with Title IX that may exist and are not discussed herein. Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, we will seek to protect, to the extent provided by law, personal information which, if released, could constitute an unwarranted invasion of privacy.

Thank you for your cooperation. If you have any questions or comments, please contact Mr. Louis O. Bryson,

Sr., Director, Postsecondary Education Division, at 404/331-2806.

Sincerely,

Louis O. Bryson, Sr.
for

Archie B. Meyer, Sr.
Regional Civil Rights Director

cc: Chief State School Officer